A

YAP HAM SEOW

v.

FATIMAWATI ISMAIL & ORS AND ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF PCA
ALIZATUL KHAIR OSMAN JCA
AZIAH ALI JCA

C [CIVIL APPEALS NO: B-01-140-03-2012
& B-01-141-03-2012]
13 SEPTEMBER 2013

D ***LAND LAW:*** *Ownership - Title to land - Evidence of ownership - Fraudulent dealings - Whether proven - Whether a purchaser's registered document of title to land overrides original owner's issue document of title - Whether conclusive evidence produced to claim ownership - Bona fide - Loss of ownership - Damages - Assessment of - Whether damages awarded to original owner of land*

E ***LAND LAW:*** *Indefeasibility of title and interest - Good faith and valuable consideration - Burden of proof - Criteria for subsequent purchaser to obtain indefeasible title - Fraud - Conveyance of land tainted with fraud - Whether a purchaser can have good title over land obtained using voidable instruments - National Land Code, s. 340(3)*

F

LEGAL PROFESSION: *Solicitors - Duty of care - Power of Attorney - Attestation of - Whether solicitor had taken all necessary steps to verify bona fides of purported power of attorney - Whether solicitors' duty of care includes duty to inform a prospective solicitor on any irregularities or discrepancies in a file*

G

The appellant ('plaintiff') was the registered owner of a piece of land ('the land'). Unbeknown to the plaintiff, one Ong Choon Teng ('the forger') purporting to act under a power of attorney

H dated 29 March 2001, had entered into a Sale and Purchase Agreement on 27 April 2001 in relation to the land with the third respondent ('third defendant') for a consideration of RM450,000. It was alleged that the power of attorney, given to the forger by the plaintiff, was attested by the first respondent ('first

I defendant'), an advocate and solicitor. The forger was represented by the second respondent ('second defendant') but they had

discharged themselves acting for the forger before the memorandum of transfer ('Form 14A') was presented for transfer of title of the land from the plaintiff in favour of the third defendant. The forger then appointed the third defendant's solicitors to jointly act on his behalf as well as the third defendant. On 5 June 2001, the third defendant's solicitors presented the Form 14A to the Pendaftar Hakmilik Selangor ('fifth defendant'). A registered document of title in continuation of the land was then issued in the name of the third defendant and a new issue document of title in continuation was also issued to the third defendant. About a year later, the fourth respondent ('fourth defendant') agreed to purchase the land from the third defendant and a Sale and Purchase Agreement was duly executed. The fourth defendant was then registered as the proprietor of the land. However, the plaintiff only discovered the status of the land when the quit rent receipt for the land was sent to her on 24 December 2003 bearing the third defendant's name. The plaintiff then instituted an action against the defendants for loss of ownership and recovery of the land. The learned trial judge allowed the plaintiff's claim and ordered that the plaintiff's name, as the registered proprietor of the land, be restored. However, the trial judge dismissed the plaintiff's claim against the first defendant and found that the third and fourth defendants were not *bona fide* purchasers and ruled that their interest in the land was defeasible. The learned trial judge also found the second and fifth defendants to be negligent and liable in causing the plaintiff to lose ownership of the land. However, the plaintiff's claim for damages against the second to the fifth defendants was dismissed. The plaintiff appealed against part of the decision of the High Court for dismissing her claim against the first defendant and for refusing the plaintiff's claim for damages. On the other hand, the second defendant filed a cross-appeal against the trial judge's findings on liability made against them. An appeal was also lodged by the fourth defendant against the decision of the trial judge whereby it was held, *inter alia*, that he did not have an indefeasible interest in title pursuant to s. 340 of the National Land Code ('NLC'). The issues that arose for determination were (i) whether the fourth defendant's registered document of title overrides the plaintiff's issue document of title under the NLC; (ii) whether the fourth defendant was a *bona fide* purchaser for valuable consideration who had acquired an indefeasible title to the land by virtue of the proviso to s. 340(3) of the NLC; (iii) whether the

A B C D E F G H I

second defendant had taken all necessary steps to verify the *bona fides* of the purported power of attorney; (iv) whether the third defendant was a *bona fide* purchaser for value and; (v) whether the plaintiff was entitled to damages for loss of ownership of the land.

Held (allowing plaintiff's claim for damages; allowing second defendant's cross-appeal)
Per Raus Sharif PCA delivering the judgment of the court:

(1) The fourth defendant, being a subsequent purchaser, obtains an indefeasible title if he could prove that he was a purchaser in good faith for valuable consideration. This is a statutory protection accorded to a subsequent purchaser. The burden of proving that there was a valuable consideration and good faith in the conveyance of the land lies on the fourth defendant. There was no evidence to show that the fourth defendant had acted in cohort with the third defendant in respect of the conveyance of the land or to suggest that the fourth defendant had any notice that the third defendant's title was defective nor was there any circumstances surrounding the Sale and Purchase Agreement to suggest that the land might have been owned by someone else when the fourth defendant inspected the land in late 2002. (paras 61 & 64)

(2) The direct evidence of the fourth defendant was neither inherently incredible nor inherently improbable. Indeed, the evidence of surrounding circumstances corroborated it. Hence, the fourth defendant was a *bona fide* purchaser for valuable consideration whose title was indefeasible by virtue of s. 340(3) of the NLC. (paras 64 & 66)

(3) In relation to the first defendant's liability, the learned trial judge had made the correct finding which was free from any appealable error. There was no reason to disturb the same. On a balance of probabilities, the first defendant did not attest the said forged power of attorney and neither did she act in cohort with the forger and his accomplice in perpetrating the fraud. (para 71)

(4) There was nothing to suggest that the purported power of attorney was irregular and that it called for further investigation on the part of the solicitor. The second defendant could not be faulted for the irregularities which were

not apparent on the face of the power of attorney and/or any other documents as referred to by the learned trial judge. All the necessary steps were taken to verify the *bona fides* of the purported power of attorney. (paras 76, 79 & 80)

(5) The second defendant's solicitor owed a duty of care to her client (the forger) which she derived from the retainer. This duty certainly did not include informing a prospective solicitor who might take over any irregularities or discrepancies in the file. The solicitor's duty of care was confined to the forger alone and not the plaintiff. She had performed her duties as a solicitor in the preparation and execution of the legal documentations, *ie*, the memorandum of transfer and the Sale and Purchase Agreement in favour of her client and when she was unable to get her client's cooperation, she decided to discharge herself. The second defendant was not negligent and neither did it in any way cohort with the forger to strip the plaintiff of her title. Accordingly, the second defendant's cross-appeal was allowed. (paras 89, 90 & 94)

(6) The third defendant was not a *bona fide* purchaser for value based on the fact that the whole transaction from the forger to the third defendant was tainted with fraud. The third defendant could not have a good title which was obtained using voidable instruments. The third defendant had concluded the sale without any proper investigation into the title or the persons who are the actual proprietors. The third defendant was under an obligation to investigate properly all matters relating to the sale of the land. A negligent purchaser could not be accorded the protection of this court because a purchaser in good faith does not include a purchaser who has been negligent or who kept his eyes shut. Hence, when a purchaser failed to take ordinary precautions which ought to have been taken in such a matter, he is not entitled to the protection of the court. The third defendant's gross negligence had facilitated the forger's elaborate and crafty plan to strip the plaintiff of her title and ownership to the land. (paras 95, 102 & 104)

(7) Since the fourth defendant had acquired an indefeasible title to the land, the learned judge's orders had to be set aside. The plaintiff should, in the circumstances, be entitled to damages for loss of ownership of the land which would be the market value of the land as at the date of this judgment. (para 108)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu ('plaintif') adalah pemilik berdaftar sebidang tanah ('tanah'). Tanpa pengetahuan plaintif, seorang bernama Ong Choon Teng ('pemalsu') yang bertindak di bawah satu surat kuasa wakil
B bertarikh 29 Mac 2001, telah memasuki satu Perjanjian Jual Beli pada 27 April 2001 berkenaan tanah itu dengan responden ketiga ('defendan ketiga') bagi jumlah RM450,000. Adalah didakwa bahawa surat kuasa wakil yang diberi kepada pemalsu oleh plaintif, telah diakusaksikan oleh responden pertama ('defendan pertama'),
C seorang peguamcara dan peguambela. Pemalsu diwakili oleh responden kedua ('defendan kedua') tetapi telah berhenti bertindak bagi pemalsu sebelum memorandum pindah milik ('Borang 14A') dikemukakan untuk pindah milik tanah daripada plaintif kepada defendan ketiga. Pemalsu kemudian melantik peguam defendan
D ketiga untuk bertindak bersama bagi pihaknya dan defendan ketiga. Pada 5 Jun 2001, peguam defendan ketiga mengemukakan Borang 14A kepada Pendaftar Hakmilik Selangor ('defendan kelima'). Satu dokumen hakmilik berdaftar bagi pelanjutan tanah telah dikeluarkan atas nama defendan ketiga dan satu dokumen hakmilik keluaran
E baru juga telah dikeluarkan kepada defendan ketiga. Setahun selepas itu, responden keempat ('defendan keempat') bersetuju untuk membeli tanah itu daripada defendan ketiga dan satu Perjanjian Jual Beli telah dimeteraikan. Defendan keempat didaftar sebagai pemilik tanah itu. Walau bagaimanapun, plaintif hanya
F sedar akan status tanah itu apabila resit cukai tanah bagi tanah itu dihantar kepadanya pada 24 Disember 2003 yang mempunyai nama defendan ketiga tercatit atasnya. Plaintif telah memulakan satu tindakan terhadap defendan-defendan bagi kehilangan milikan dan pemulihan tanah. Yang arif hakim telah membenarkan tuntutan
G plaintif dan memutuskan agar nama plaintif, sebagai pemilik berdaftar tanah, dikekalkan. Walau bagaimanapun, hakim bicara menolak tuntutan plaintif terhadap defendan pertama dan mendapati bahawa defendan-defendan ketiga dan keempat bukanlah pembeli *bona fide* dan memutuskan bahawa kepentingan
H mereka atas tanah boleh disangkal. Yang arif hakim juga mendapati defendan-defendan kedua dan kelima cuai dan bertanggungjawab kerana menyebabkan plaintif hilang milikannya atas tanah. Walau bagaimanapun, tuntutan plaintif bagi ganti rugi terhadap defendan-defendan kedua dan kelima ditolak. Plaintif merayu terhadap
I sebahagian keputusan Mahkamah Tinggi kerana menolak tuntutan beliau terhadap defendan pertama dan kerana menolak tuntutan

plaintif untuk ganti rugi. Sebaliknya, defendan kedua telah membuat rayuan silang terhadap penemuan hakim bicara atas liabiliti yang dibuat terhadapnya. Satu rayuan juga telah dibuat oleh defendan keempat terhadap keputusan hakim bicara di mana ia diputuskan, antara lain, bahawa beliau tidak mempunyai kepentingan dalam hak milik yang tidak boleh disangkal menurut s. 340 Kanun Tanah Negara ('KTN'). Isu-isu yang dibangkitkan untuk pertimbangan adalah (i) sama ada dokumen hakmilik berdaftar defendan keempat diatasi oleh dokumen hakmilik keluaran plaintif di bawah KTN; (ii) sama ada defendan keempat adalah pembeli *bona fide* dengan nilai yang telah memperolehi hakmilik yang tidak boleh disangkal atas tanah berikutan s. 340(3) KTN; (iii) sama ada defendan kedua telah mengambil segala tindakan untuk menentusahkan surat kuasa wakil adalah *bona fide*; (iv) sama ada defendan ketiga adalah pembeli *bona fide* untuk nilai dan; (v) sama ada plaintif layak untuk ganti rugi bagi kehilangan milikan atas tanah.

Diputuskan (membenarkan tuntutan plaintif untuk ganti rugi; membenarkan rayuan silang defendan kedua)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Defendan keempat, iaitu pembeli seterusnya, akan memperolehi hak yang tidak boleh disangkal jika beliau boleh membuktikan bahawa dia adalah pembeli suci hati untuk nilai. Ini adalah satu perlindungan statutori yang diberikan kepada pembeli seterusnya. Beban membukti bahawa adanya balasan bernilai dan suci hati dalam pemindahhakkan tanah terletak atas defendan keempat. Tiada bukti menunjukkan bahawa defendan keempat telah bertindak menyokong defendan ketiga berkenaan pemindahhakkan tanah atau bercadang bahawa defendan keempat mempunyai notis bahawa hakmilik defendan ketiga adalah cacat ataupun terdapatnya hal keadaan yang mengelilingi Perjanjian Jual Beli untuk mencadangkan bahawa tanah mungkin dimiliki oleh orang lain apabila defendan keempat memeriksa tanah itu pada akhir tahun 2002.

(2) Keterangan langsung defendan keempat bukannya tidak boleh dipercayai ataupun tidak mustahil. Keterangan hal keadaan sekitaran telah menyokongnya. Oleh itu, defendan keempat adalah pembeli *bona fide* untuk nilai dan hak miliknya tidak boleh disangkal di bawah s. 340(3) KTN.

(3) Berkenaan liabiliti defendan pertama, yang arif hakim bicara telah membuat penemuan betul yang bebas daripada sebarang kekhilafan yang boleh dirayu. Tiada sebab untuk mengganggunya. Atas imbangan kebarangkalian, defendan pertama tidak mengakusaksi surat kuasa wakil yang palsu itu ataupun bertindak menyokong pemalsu dan rakan subahatnya dalam melakukan frod.

(4) Tiada apa-apa untuk mencadangkan bahawa surat kuasa wakil itu adalah tidak teratur dan ia perlu disiasat dengan lebih lanjut oleh peguam. Defendan kedua tidak boleh dipersalahkan bagi ketidakaturan itu yang tidak jelas atas muka surat kuasa wakil itu dan/atau mana-mana dokumen lain seperti dirujuk oleh yang arif hakim. Segala tindakan yang diperlukan telah diambil untuk mengesahkan bahawa surat kuasa wakil adalah *bona fide*.

(5) Peguam defendan kedua mempunyai tanggungjawab berjaga-jaga terhadap anakguamnya (pemalsu) yang diperolehi melalui "retainer". Tugas ini tidak merangkumi untuk memaklumkan bakal peguam yang mungkin akan mengambil alih sebarang salah aturan atau kepincangan dalam fail. Kewajipan berjaga-jaga peguam terhad kepada pemalsu sahaja dan bukannya terhadap plaintif. Beliau telah menjalankan tugasannya sebagai peguam dalam persediaan dan pelaksanaan dokumen-dokumen undang-undang, iaitu, memorandum hakmilik dan Perjanjian Jual Beli bagi pihak anakguamnya dan apabila beliau gagal untuk mendapat sokongan anakguamnya, maka beliau membuat keputusan untuk berhenti bertindak. Defendan kedua tidak cuai ataupun menyokong pemalsu untuk melucutkan hakmilik plaintif. Dengan itu, rayuan silang defendan kedua dibenarkan.

(6) Defendan ketiga bukanlah seorang pembeli *bona fide* untuk nilai berdasarkan fakta bahawa segala transaksi daripada pemalsu kepada defendan ketiga dicemar dengan frod. Defendan ketiga tidak mempunyai hakmilik baik yang diperolehi melalui instrumen tidak sah. Defendan ketiga telah menyelesaikan jualan tanpa membuat sebarang siasatan yang berpatutan terhadap hakmilik ataupun pihak yang merupakan pemilik sebenarnya. Defendan ketiga mempunyai obligasi untuk menyiasat segala perkara berkaitan dengan jualan tanah itu. Pembeli yang cuai tidak boleh diberi perlindungan mahkamah ini kerana pembeli suci hati tidak merangkumi pembeli yang

telah cuai atau tidak berbuat apa-apa. Oleh itu, apabila pembeli gagal mengambil langkah berjaga-jaga yang sepatutnya diambil di dalam perkara sebegini, beliau tidak layak mendapat perlindungan dari mahkamah. Kecuaian defendan ketiga telah memudahkan pemalsu untuk melucutkan hak dan milikan plaintif terhadap tanah.

(7) Memandangkan defendan keempat telah memperolehi hakmilik yang tidak boleh disangkal atas tanah itu, maka perintah yang arif hakim terpaksa diketepikan. Dalam keadaan sedemikian, plaintif adalah layak bagi ganti rugi untuk kehilangan milikan tanah itu yang merupakan nilai pasaran tanah pada tarikh penghakiman ini.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

Jamir Hassan Najir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC ***(refd)***

Lee Chee Kiang v. Johnson Tan Teck Seng & Anor [2011] 9 CLJ 498 HC ***(foll)***

Midland Bank Trust Co Ltd & Anor v. Hett, Stubbs & Kemp [1978] 3 All ER 571 ***(refd)***

Neogh Soo Oh & Ors v. G Rethinasamy [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 HC ***(foll)***

Oliver v. Hinton [1899] 2 Ch 264 ***(refd)***

Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors [2013] 1 CLJ 153 HC ***(dist)***

Simmons v. Pennington & Son (A Firm) [1955] 1 All ER 240 ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(foll)***

Teh Bee v. K Maruthamuthu [1977] 1 LNS 134 FC ***(foll)***

Legislation referred to:

National Land Code, ss. 5, 89, 166, 168, 340(2), (3), 431, 433

(Appeal No: B-01-140-03-2012)

For the plaintiff - Bastian Vendargon (PK Nathan & Anne Vendargon with him); M/s Bastian Vendargon

For the 1st defendant - Azhar Arman Ali; M/s Arman-Yunos

For the 2nd defendant - Wong Hok Mun (PS Koh with him); M/s Azim, Tunku Farik & Wong

For the 3rd defendant - Nooraida Che Zahari; M/s T Rajagopalu & Co

For the 4th defendant - CW Yeo (MY Phan & JC Yong with him); M/s Wilson Wong & Tan

For the 5th defendant - Md Azhari Abu Hanif; SFC

(Appeal No: B-01-141-03-2012)
For the plaintiff - Bastian Vendargon (PK Nathan & Anne Vendargon with him); M/s Bastian Vendargon
For the 1st defendant - Azhar Arman Ali; M/s Arman-Yunos
For the 2nd defendant - Wong Hok Mun (PS Koh with him); M/s Azim, Tunku Farik & Wong
For the 3rd defendant - Nooraida Che Zahari; M/s T Rajagopalu & Co
For the 4th defendant - CW Yeo (MY Phan & JC Yong with him); M/s Wilson Wong & Tan
For the 5th defendant - Md Azhari Abu Hanif; SFC

[Appeal from High Court, Shah Alam; Civil Suit No: MT1-21-41-2004]

Reported by Thirunavakarasu Vijayan

JUDGMENT

Raus Sharif PCA:

Introduction

[1] There are two appeals and one cross appeal before us filed against the decision of the learned Judicial Commissioner (trial judge) of High Court Shah Alam delivered on 16 February 2012. Before embarking further it is pertinent that we introduce the parties to said appeals and the impugned orders that are being appealed against.

[2] In brief, at the High Court, the plaintiff instituted an action for loss of ownership and recovery of her land held under CT 23345, Lot 8659 Mukim Kajang, in Daerah Ulu Langat. In the writ of summons she had named five parties whom she alleged were liable to her losing the ownership and interest to the land. The five defendants sued by the plaintiff were the following:

(i) Fatimawati binti Ismail (first defendant);

(ii) Tetuan Isa Ling & Mok (second defendant);

(iii) Debarath Metal Sdn Bhd (third defendant);

(iv) Kasi a/l KL Palaniappan (fourth defendant); and

(v) Pendaftar Hakmilik Negeri Selangor (fifth defendant).

[3] The learned trial judge after a full trial allowed the plaintiff's claim and ordered that the plaintiff's name as the registered proprietor of the land to be restored. In so doing, the trial judge dismissed the plaintiff's claim against the first defendant and found the third and fourth defendants not to be *bona fide* purchasers and ruled that their interest in the land was defeasible. The learned trial judge also found the second and fifth defendants to be negligent and liable in causing the plaintiff to lose ownership of the land. The plaintiff's claim for damages against the second and fifth defendants as well as against the third and fourth defendants was however dismissed. With regard to costs, the learned trial judge awarded costs of the proceedings to the plaintiff and the first defendant, which is to be borne by the second, third, fourth and fifth defendants equally.

[4] Stemming from the aforesaid decision the plaintiff lodged an appeal *vide* Civil Appeal No: B-01-140-03-2012 (plaintiff's appeal) against part of the decision of the learned trial judge. The plaintiff's appeal is confined to that part of the learned trial judge's orders in dismissing the plaintiff's claim against the first defendant and in refusing the plaintiff's claim for damages. The plaintiff also appealed against the order of costs by the learned trial judge which they claim should have been made jointly and severally against the second, third, fourth and fifth defendants. The second defendant on the other hand has lodged a cross appeal in the plaintiff's appeal to appeal against the learned trial judge's findings of liability made against them.

[5] Against the same decision, an appeal was also lodged by the fourth defendant *vide* Civil Appeal No: B-01-141-03-2012 (the fourth defendant's appeal). The fourth defendant's appeal was preferred against the findings of the learned trial judge that the fourth defendant was not a *bona fide* purchaser and did not have an indefeasible interest in the title pursuant to s. 340 of the NLC. In this appeal, the plaintiff, the first, second, third and fifth defendants are named as the first, second, third, fourth and fifth respondents respectively.

[6] We heard the plaintiff's appeal, the second defendant's cross appeal and the fourth defendant's appeal on 10 January 2013. After hearing the parties, we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same.

A **Background Facts**

[7] This is yet another case where a landowner has been defrauded of her land. The unfortunate landowner in this case is Madam Yap Ham Seow ("the plaintiff").

B **[8]** The plaintiff was the registered owner of a piece of land held under CT 23345, Lot 8659, Mukim of Kajang, in the District of Ulu Langat, Selangor ("the land"). Unbeknown to the plaintiff, one Ong Choon Teng ('the forger') purporting to act under a power of attorney dated 29 March 2001, had entered into a sale C and purchase agreement on 27 April 2001 with Debarath Metal Sdn Bhd ("third defendant") in respect of the land for the consideration of RM450,000 ("SPA between the forger and the third defendant").

D **[9]** The power of attorney purportedly given to the forger by the plaintiff was attested by Fatimawati binti Ismail ("first defendant") an advocate and solicitor practicing in Bangi.

[10] In the SPA between the forger and the third defendant, E the third defendant was represented by Messrs T Rajagopalu & Co. The forger on the other hand was represented by Messrs Isa, Ling & Mok ("second defendant") with Ms Mok Shian Ping ("DW5") being the solicitor in charge. DW5 had attested the forger's signature on the SPA as well as the memorandum of F transfer (Form 14A) under the National Land Code ("NLC").

[11] However, on 16 May 2001, even before Form 14A was presented for transfer of title of the land from the plaintiff in favour of the third defendant, the second defendant discharged themselves from acting for the forger. The forger had by then G appointed the third defendant's solicitors to jointly act on his behalf as well as on the third defendant's behalf.

[12] On 5 June 2001, the third defendant's solicitor presented Form 14A to the Pendaftar Hakmilik Selangor ("the fifth H defendant") to transfer the title of the land from the plaintiff in favour of the third defendant.

[13] On 8 June, 2001, a register document of title in continuation of the land was issued by the fifth defendant in the I name of the third defendant and a new issue document of title in continuation was also issued to the third defendant.

[14] About one year after the third defendant was registered as the proprietor of the land, the fourth defendant agreed to purchase the land from the third defendant for the sum of RM1,150,000. On 21 February 2003, the third and fourth defendants executed a sale and purchase agreement ("SPA between third defendant and fourth defendant"). In the SPA, the fourth defendant was represented by Messrs Wilson Wong & Tan (fourth defendant's solicitors) and the third defendant was once again represented by Messrs T Rajagopalu (third defendant's solicitors).

[15] Upon signing of the SPA between the third defendant and the fourth defendant, the fourth defendant paid the initial 10% deposit of RM115,000. Thereafter, in accordance with the terms of the SPA, the third defendant's solicitors deposited with the fourth defendant's solicitors, *inter alia*, Form 14A in favour of the fourth defendant. Subsequently, Form 14A dated 1 April 2003 was executed by the third defendant and a Stamp Duty Proforma Form ("Form PDS 15") dated 1 April 2003 was also executed by the third defendant's solicitors on behalf of the third defendant.

[16] On 1 April 2003, the fourth defendant's solicitors prepared and lodged a private caveat on the land to protect the fourth defendant's interest. At the same time the fourth defendant's solicitors submitted Form 14A and Form PDS 15 to the Collector of Stamp Duty for the purpose of assessing the stamp duty payable.

[17] On 18 August 2003, the fourth defendant paid the balance purchase price, less a sum of RM210,000 which was withheld by the fourth defendant's solicitors as stakeholder towards payment of any real property gains tax payable by the third defendant to the Inland Revenue. In return, the third defendant's solicitors released to the fourth defendant's solicitors, the issue document of title of the land.

[18] On 28 August 2003, the fourth defendant's solicitors presented Form 14A, together with the issue document of title to the fifth defendant for the purposes of transferring the title of the land from the third defendant to the fourth defendant. On 28 August 2003, the fourth defendant was registered as the proprietor of the land.

[19] The plaintiff discovered all the above after she had inadvertently been alerted to something amiss, when her quit rent receipt for the land was sent to her on 24 December 2003 bearing the third defendant's name. Accordingly, the plaintiff instituted an action against the first, second, third, fourth and fifth defendants for the recovery of her land.

The Plaintiff's Case

[20] The plaintiff's pleaded case was that, she was at all material times the registered proprietor of the land since 1965 and she had never parted with the title of the land. It was alleged that the replacement title in respect of the land was issued to the third defendant by way of a forged power of attorney. The plaintiff's stance is that her title is untainted and as a reason thereof the circumstances enumerated under s. 340 of the NLC to defeat her title are absent.

[21] At the High Court the plaintiff led evidence to show that she had always settled the quit rent for the land and the land was not vacant land as it was cultivated with rubber plantation which was supervised by a manager appointed by the plaintiff herself. She also testified that she only came to know of the forgery when she received a notice from Pejabat Tanah Dan Galian Negeri Selangor on 24 December 2003 in respect of the quit rent of the land bearing the third defendant's name. Further enquires which were made by the plaintiff and her son led to the discovery and details of the fraudulent transfer of the land to the third defendant *vide* a forged power of attorney; and, later from the third defendant to the fourth defendant who has now become the registered proprietor of the land. Upon discovery of the purported fraud the plaintiff entered a private caveat on the land to safeguard her interest.

[22] Insofar as the first defendant was concerned, it is the plaintiff's pleaded case that the first defendant was negligent in attesting the power of attorney in light of the blatant irregularities in the power of attorney which contained two donees ie, Ong Chow Teng and Ong Choon Teng. Further, the plaintiff also contended that the first defendant was negligent in attesting the power of attorney without the presence of the donor (the plaintiff). As for the second defendant, it was the plaintiff's pleaded case that the second defendant was negligent in finalising the sale and purchase agreement between the forger and the third defendant in relation to the land, which had caused the land to be transferred to the third defendant.

[23] It was the plaintiff's submission that the third and fourth defendants were not *bona fide* purchasers for valuable consideration as both did not take any action to obtain physical possession of the land. As for the title of the land, the plaintiff had consistently maintained that the third and the fourth defendant's title was derived fraudulently using void instruments which were in breach of the mandatory provisions of the NLC. Hence, it is the plaintiff's pleaded case that the third and fourth defendants had no valid title at any point of time. Under these circumstances, the plaintiff contends that the replacement title issued in their favour cannot override the plaintiff's original issue document of title under the NLC.

[24] It was also the plaintiff's pleaded case that the replacement title was negligently issued by the fifth defendant without enquiring whether or not the original title was surrendered by the plaintiff. The plaintiff took the position that the fifth defendant was negligent in permitting the transfer of the title although the instruments of registration were not in order. Apart from this, it was also the plaintiff's pleaded case that the fifth defendant failed to give notice to the plaintiff regarding the replacement of the supposedly lost original issue document of title.

[25] The plaintiff therefore claimed against the defendants for, *inter alia* a declaration that her rights to the title and interest in the land was not affected by the transfers to the third defendant and subsequently to the fourth defendant, and that there be an order that she is still the rightful registered owner of the land and all memorials in the register subsequent to her ownership be ordered to be deleted and such other directions be made to restore her rights and interest to the land. In short, the plaintiff claimed that the transfer of the land to the third defendant and subsequently to the fourth defendant was null and void and thus sought for an order to restore her name as the registered proprietor of the land. The plaintiff also claimed damages as well as costs against all the defendants.

The Defendants' Case

[26] The first defendant in her defence pleaded that she was not involved in the preparation and attestation of the purported power of attorney and the filing of the same in the Shah Alam High Court. The first defendant consistently maintained that the whole

transaction was a fraudulent scheme which she was in no way blameworthy. Thus, the damages suffered by the plaintiff if any was not because of the first defendant's alleged wrongdoing.

[27] The second defendant in resisting the plaintiff's claim took the position that it was not in breach of its duty of care and it did not cause the plaintiff's loss. At all material times, the second defendant acted on the instructions of the forger, who was the duly appointed attorney of the plaintiff by virtue of the power of attorney.

[28] The third defendant's pleaded defence was that the plaintiff had failed to prove its cause of action in fraud for its failure to bring one Ong Choon Teng as a defendant in this suit. This is so, given the active role played by the latter in the alleged forgery and falsification of the instruments which in turn had facilitated the transfer of the land to the third defendant. It is also the third defendant's defence that it is a *bona fide* purchaser for value which had bought the land through a valid sale and purchase agreement *via* the power of attorney given by the plaintiff.

[29] The fourth defendant's pleaded defence was that he had entered into a sale and purchase agreement with the third defendant and bought the land at the purchase price of RM1,150,000 after a land search was duly conducted. The fourth defendant contends that the whole transaction was one between a willing buyer and willing seller. In short, the fourth defendant's stand was that he was a *bona fide* purchaser for valuable consideration of the land.

[30] The fifth defendant's position as can be gathered from their defence is that they were not negligent in the issuance of the new title in continuation.

Decision Of The Learned Trial Judge

[31] On 16 February 2012, after full trial, the learned trial judge allowed the plaintiff's claim in part. In so doing, the learned trial judge made the following orders, namely:

(a) a declaration that the plaintiff's title and interest in the land was not affected by the transfer from the forger to the third defendant and by the subsequent transfer from the third defendant to the fourth defendant;

(b) that the plaintiff was the rightful owner of the land and that all memorials in the register subsequent to her ownership be deleted;

(c) a declaration that the transfer dated 2 May 2001 transferring the land to the third defendant and the transfer dated 1 April 2003 transferring the land from the third defendant to the fourth defendant was null and void;

(d) the replacement title known as "Geran No: 44293" shall be cancelled by the fifth defendant or the appropriate authority;

(e) that the plaintiff's name as the registered proprietor of the land be restored;

(f) the plaintiff's claim for damages against the first, second and fifth defendants be dismissed;

(g) no orders made in relation to the fourth defendant's notice of indemnity against the second-fifth defendants; and

(h) costs to be paid by the second, third, fourth and fifth defendants equally to the plaintiff and the first defendant.

[32] The learned trial judge in making the abovementioned orders was guided by the following findings:

(a) since the power of attorney, statutory declaration, the signature of the Commissioner of Oaths and the police report were all instruments of fraud, it follows that in all likelihood it was also part of the *modus operandi* of the fraudsters to forge the signature and rubber stamp of the first defendant in the said power of attorney. This was further propounded by the fact that on the even date when the power of attorney was attested the first defendant was not in her office. Hence, on balance of probabilities the learned trial judge found that the first defendant could have not attested the power of attorney;

(b) that the second defendant and by extension DW5 was negligent in failing to inspect the authenticity of the documents or to inform Messrs T Rajagopalu & Co of the two different versions pertaining to the whereabouts of the title and the unavailability of the quit rent receipts before she discharged herself from acting for the forger;

(c) the third defendant or its firm of solicitors should have investigated and/or inquired as to the actual value of the land before concluding the sale and purchase thereof;

(d) that on a balance of probabilities the third defendant was not a *bona fide* purchaser as it has not taken physical possession of the land;

(e) that on a balance of probabilities the fourth defendant was not a *bona fide* purchaser as the fourth defendant has not taken physical possession of the land nor had he insisted that the third defendant deliver vacant possession to him. The fourth defendant also did not take any steps to recover the land even though he knew that the land was cultivated with rubber plantation and was managed by someone else; and

(f) that the fifth defendant was negligent in their failure to adhere to the salient provisions of s. 166, s. 168, s. 431, and s. 433 of the NLC. The failure to adhere to the aforesaid provisions had caused the new title to be issued, which had facilitated the transfer of the land, without the knowledge of the plaintiff, to the third defendant and later to the fourth defendant.

[33] Aggrieved by the aforesaid findings the plaintiff, the second defendant and the fourth defendant had lodged their respective appeals to the Court of Appeal.

Findings

[34] At the outset we must highlight the following undisputed facts:

(a) Parties had conceded in their submissions based on evidence led during the trial that the transfer of the land from the plaintiff *via* the fraudulent power of attorney to the third defendant was tainted with fraud. The plaintiff is still in possession of the original title and has never surrendered or parted with the same to anyone. Based on incontrovertible evidence it is clear that she never signed the purported power of attorney, neither did she ever make any police report (ID2) nor statutory declaration (ID3) stating that the title was lost;

(b) No notice was sent by the fifth defendant to the plaintiff's last known address regarding the supposedly lost original title and that it was going to be replaced;

(c) As of today there are two titles for the same piece of land; and

(d) Ong the forger is now dead. He died on 1 September 2009.

[35] Having highlighted the aforesaid we will now proceed to consider the issues raised in the respective appeals.

Appeal No. B-01-141-03-2012 (Fourth Defendant's Appeal)

[36] We shall deal with the fourth defendant's appeal first. As what we can gather from the submissions of the parties, there are two preliminary issues to be answered in this appeal, namely:

(i) whether the fourth defendant's registered document of title to the land (with the new title Geran 44293) overrides the plaintiff's issue document of title (with the old title CT 23345 Lot 8659) under the NLC; and

(ii) whether the fourth defendant was a *bona fide* purchaser for valuable consideration who had acquired an indefeasible title to the land by virtue of the proviso to s. 340(3) of the NLC.

[37] We shall deal with both the issues in turn. As for the first issue the thrust of the fourth defendant counsel's argument was that the proprietor for the time being by virtue of s. 89 of the NLC applies to the fourth defendant and not the plaintiff. Learned counsel argued that by virtue of s. 89 of the NLC, the register document of title is conclusive evidence that the title to the property is vested in the person named therein as proprietor. Learned counsel for the plaintiff on the other hand conversely submitted that since the issue document of title bears the plaintiff's name, she is the registered owner. Learned counsel further submitted that since the plaintiff is first in time to obtain ownership of the land, therefore it follows that her interest defeats the fourth defendant's interest. In the circumstances, learned counsel submitted that the plaintiff's interest in the land is indefeasible.

[38] In addressing the first issue it is pertinent to pay heed to s. 89 of the NLC which provides that:

> 89. Conclusiveness of registered documents of title.
>
> Every register document of title duly registered under this Chapter shall, subject to the provision of this Act, be conclusive evidence:
>
> (a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and
>
> (b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified or referred to in that document.

[39] From the plain reading of the aforesaid provision it is evident that:

> Every register document of title duly registered under this Chapter shall, subject to the provision of this Act, **be conclusive evidence**:
>
> (a) **that title to the land described therein is vested in the person or body for the time being named therein as proprietor.** (emphasis added)

[40] In view of the clarity of the words employed in the abovementioned provision, there is just no two ways about the interpretation to be given to this section. It is patently clear that since the register document of title is conclusive evidence of ownership and in the present instance since the register document of title bears the name of the fourth defendant as the registered proprietor, hence it follows and becomes conclusive evidence that the fourth defendant is the registered proprietor for the time being. We derive support for this view from the Federal Court case of *Teh Bee v. K Maruthamuthu* [1977] 1 LNS 134; [1977] 2 MLJ 7 which held that:

> the fact that the register document of title was in the name of the appellant was conclusive evidence that the title to the land was vested in the appellant.

[41] Under the circumstances, we are inclined to agree with the fourth defendant's contention that it is the person who is named in the register document of title as the proprietor is the one who is recognised by s. 89 of the NLC. The issue document of title

may only constitute *prima facie* evidence but not conclusive evidence as s. 5 of the NLC clearly defines a **register document of title** to mean - "any document registered, or prepared for registration under this Act and **evidencing** or, as the case may be, **intended to evidence title to the land**" (emphasis added). Hence, we would respectfully dissent from the plaintiff's proposition that since she was the first in time and given that the issue document of title bears her name, it follows that she is the registered proprietor. In determining ownership as in the instant case the court should not be concerned with how the fourth defendant got his name onto the register document of title or whose interest takes priority over the other. Rather, for us the question of critical importance at the end of the day so far as the issue of ownership is concerned boils down to this: whether the interest of the fourth defendant as the registered proprietor whose name is in the register document of title is indefeasible. This is indeed the thrust of the second issue in the fourth defendant's appeal.

[42] In this regard, learned counsel for the fourth defendant argued forcefully that the proviso to s. 340(3) of the NLC ensures that the title acquired by the fourth defendant as subsequent purchaser of the land is indefeasible. This, according to him is irrespective of whether the third defendant had acquired the title *via* a void and/or insufficient instrument of transfer from the plaintiff. Learned counsel submitted that the fourth defendant had discharged the burden laid upon him to prove that he is a *bona fide* purchaser for valuable consideration.

[43] In addressing the second issue we are to determine whether s. 340 of the NLC confers indefeasibility of title or interest to the fourth defendant. Section 340 of the NLC provides for registration to confer indefeasibility of title or interest except in certain circumstances which are clearly stipulated herein below:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

A (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

B (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):

C (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested;

D Provided that nothing in this sub-section shall effect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchase.

E **[44]** Based on the aforesaid provisions and bearing in mind the issues canvassed by the fourth defendant in this appeal, we are to consider the following:

F (i) whether the fourth defendant is an immediate purchaser or subsequent purchaser who is now a registered proprietor of the land in question? Following this, what is the status of the fourth defendant's title ie, whether it is defeasible or indefeasible taking into consideration that the transfer of title from the forger to the third defendant was tainted with fraud; and

G (ii) whether the fourth defendant is a *bona fide* purchaser for valuable consideration.

H **[45]** In embarking upon the determination of the aforesaid issues it is pertinent to allude to the authoritative pronouncement of the Federal Court in the case of *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 (*Tan Ying Hong*) where the scope of s. 340 of the NLC was discussed at great length. Pertinent to note is

I that the Federal Court case of *Tan Ying Hong* had corrected the misstatement of law committed by the earlier decision of the same court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 (*Adorna Properties*).

[46] The issue before the Federal Court in *Tan Ying Hong* was whether the appellant in that case had, at the point of transfer, obtained immediate or deferred indefeasibility. The Federal Court also took the liberty to deliberate on the ramifications of s. 340 of the NLC and subsequently analysed the judgment of the same court in *Adorna Properties* in its ruling that the proviso to s. 340(3) of the NLC was only dealing with one category of registered proprietors, namely purchasers in good faith and for value, and that, for this category of registered proprietors, they could still obtain immediate indefeasibility notwithstanding that the title was acquired through forged document. In brief, the factual matrix of *Tan Ying Hong* may be delineated hereunder:

> The appellant plaintiff is the registered owner of a piece of land held under H.S (M) No: 6033 PT No 6371 Mk. Kuala Kuantan, Kuantan, Pahang ("the land"). Unbeknown to the appellant, the 1st respondent/defendant purporting to act under a power of attorney executed two charges in favor of United Malayan Banking Corporation, the 3rd respondent/defendant to secure the loans of RM200,00 and RM100,000 respectively. The loans were made in favor of Cini Timber Industries Sdn Bhd, the 2nd respondent/Defendant. The 2nd respondent reneged on the repayment and the 3rd respondent demanded the payment from the appellant. The appellant sought to declare the charges null and void on the ground that the PA was forged. The appellant claimed he did not sign the PA. He claimed it was forged. He only became aware of the forgery when he received a notice of demand from the 3rd respondent dated 9 March 1985.

[47] The appellant filed a claim in the High Court seeking the following reliefs:

(a) a declaration that the said charges are void *ab initio*;

(b) an order expunging from the register and the issue document of title the memorial of charges against the land;

(c) an order directing the third respondent to deliver upon to him the issue document of title to the land; and

(d) a declaration that the PA purportedly executed by him in favour of the first respondent is void *ab initio* and an order cancelling or revoking the same.

[48] The High Court dismissed the appellant's claim on the grounds that the appellant was not the "actual owner of the land" and s. 340(3) of the NLC (read with its proviso) had protected the third respondent. The appellant's appeal to the Court of Appeal was also dismissed.

[49] The appellant preferred an appeal to the Federal Court and the Federal Court was invited to answer the following issues:

(i) whether the concept of indefeasibility as adverted to in s. 340 NLC referred to immediate or deferred indefeasibility;

(ii) whether the proviso to sub-s. (3) of s. 340 NLC applied only to that subsection, and not to the provision of sub-s. (2);

(iii) whether the Federal Court in *Adorna Properties* had misconstrued the provision of sub-ss. (2) and (3) of s. 340 NLC;

(iv) whether the ruling in *Adorna Properties* was no longer good law; and

(v) whether the Court of Appeal had misdirected itself in law for being overly concerned with the manner the appellant here had got his name registered onto the title.

[50] His Lordship Arifin Zakaria CJ (Malaya) (now CJ) in delivering the judgment of the court eloquently explained the application of s. 340 of the NLC and the true interpretation to be given to the proviso in s. 340(3) in the following manner:

> subsection (3) of section 340 NLC merely provided that any title or interest which was defeasible by any of the circumstance specified in sub-s (2) shall continue to be liable to be set aside in the hands of a subsequent holder of such title or interest. That subsection was subject to the following provision which read "provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such purchaser". The provision was directed towards the provision of sub-s (2) supported by the use of the words "in this subsection" found therein. The application of the provision could not be projected into the sphere or ambit of any other provision of s. 340.
>
> *Even though sub-3(a) and (b) refer to the circumstances specified in sub-s (2) they are restricted to subsequent transfer or to interest in the land subsequently granted there out. So it could not apply to the*

> *immediate transferee of any title or interest in any land. Therefore a person or body in the position of Adorna Properties could not take advantage of the provision to the sub-s. (3) to avoid its title or interest form being impeached*. It is our view that the proviso which expressly stated to be applicable solely to sub-s. (3) ought not to be extended as was done by the Court in *Adorna Properties*, to apply to sub-s. (2)(b). By doing so the court had clearly gone against the clear intention of Parliament.
>
> For the above reasons, with respect, we hold that the Federal Court in *Adorna Properties* had misconstrued s. 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the provision appearing in sub-s. (3) equally applies to sub-s (2). By so doing the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s. 340 of the NLC. (emphasis added)

As for the issue of the forged instruments His Lordship had this to say:

> it is not in dispute that the two charges registered in favor of the 3rd respondent based on void instruments as the relevant Forms 16A were not executed by the appellant. They were executed by the 1st respondent pursuant to a forged PA. Thus, the charge instruments (Form 16A) used in the present case was indisputably void instruments. It follows, therefore that the two charges in this case are liable to be set aside under s. 340(2)(b) since they are based on void instruments.

[51] For the reasons aforesaid the Federal Court found that the third respondent being an immediate holder of these charges could not take advantage of the proviso to sub-s. (3) of s. 340 making his title defeasible.

[52] We are of the considered view that the decision of the Federal Court in *Tan Ying Hong* is of utmost importance for the purpose of deciding the fourth defendant's appeal. We have laid emphasis to the earlier paragraph in the same case because in it lies the answer to the issues canvassed in the fourth defendant's appeal. Now guided by the ruling of the Federal Court in *Tan Ying Hong* we will now proceed to consider the issues raised in this instant appeal. As we have adverted to in the earlier part of this judgment the learned trial judge found that the fourth defendant was not a *bona fide* purchaser for value as he failed to take physical possession of the land and also failed to take the necessary steps to recover the land. The learned trial judge was

fortified in coming to this conclusion based on the fact that the land was cultivated with rubber plantation and managed by someone else.

[53] We have perused the evidence and scrutinised the documents with the aid and assistance of learned counsel. On a keen scrutiny of the evidence brought on record we find that the learned trial judge had misdirected himself on facts and law in failing to appreciate the evidence before him. The learned trial judge took into account unnecessary considerations and as a result had asked the wrong questions in arriving at the decision as he did. Had the learned trial judge directed himself correctly upon the standard of proof and judicially appreciated the evidence before him, he would have come to the conclusion that the fourth defendant had established his case that he is a *bona fide* purchaser for a value and his interest to the said land is indefeasible.

[54] The criticism leveled by the fourth defendant against the learned trial judge's findings calls for the reproduction of the relevant passages from his written judgment:

> 28. Defendant Keempat dalam keterangannya mengakui bahawa beliau tidak pernah mengambil tindakan untuk mendapatkan semula milikan tanah tersebut mahupun ada menyatakan Defendan Ketiga telah menyerahkan milikan kosong tanah tersebut kepadanya. Malahan Plaintiff telah mengusahakan dan menikmati hasil dari tanah tersebut tanpa gangguan dari pihak Defendan Ketiga dan Defendan Keempat. Keadaan ini menggambarkan bahawa Defendan Ketiga dan Keempat menyedari bahawa ada orang lain yang memiliki milikan fizikal tersebut tetapi mereka membiarkan tanpa apa-apa tindakan sewajarnya untuk memiliki tanah tersebut walaupun mereka mendakwa mereka adalah pembeli *bona fide* atas tanah tersebut. Keadaan dan kelakuan Defendan Ketiga dan Defendan Keempat ini tidak konsisten dengan keterangan mereka bahawa mereka ialah pembeli *bona fide* …
>
> 30. Atas imbangan kebarangkalian, lebih berkemungkinan Defendan Ketiga dan Defendan Keempat bukannya pembeli *bona fide* ke atas tanah tersebut.

[55] In our judgment the above quoted passage from the learned trial judge's grounds of judgment overlooked certain vital aspects of the case at hand. The way we perceive it, the learned trial judge had misdirected his mind in failing to appreciate the fourth

defendant's stand in this instant case as a subsequent purchaser. Instead, the learned trial judge was more concerned with the issue of physical possession of the land. With the utmost respect, we are of the view that this is not the issue which should concern the court because the real issue here is whether the fourth defendant had acquired a good title which is indefeasible.

[56] In this context it may be useful to refer to the case of *Jamir Hassan Najir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773; [1992] 2 MLJ 46 where Justice Haidar J (as he then was) had this to say:

> ... The basic object of the Torrens system, it would appear, is to facilitate proof of ownership by certifying title in a written instrument; and, therefore the principle of allowing ownership to be proved by evidence of physical occupation should be rejected...

[57] Based on the authority cited in the preceding paragraph we find that the learned trial judge erred in giving undue consideration to the issue of physical possession of the land. In our considered view the learned trial judge ought to have in the forefront of his mind stood guided by the authoritative pronouncement of the Federal Court in the case of *Tan Ying Hong*. There is no dispute that the fourth defendant stood as a subsequent purchaser in the conveyance of the land. The issue is whether he was a *bona fide* purchaser for value.

[58] Learned counsel for the plaintiff *albeit* acknowledging the fact that the fourth defendant was a subsequent purchaser however had conversely submitted before us that he cannot avail himself of the protection accorded under s. 340(3) of the NLC. This is because the title in continuation which is now issued in favour of the fourth defendant is tainted with fraud. The plaintiff advanced their submissions on the basis that an unlawful title cannot provide the basis for conclusiveness within the meaning of s. 89 of the NLC. This argument was further compounded by the fact that there was a clash of title between the plaintiff's original title and the fourth defendant's title in continuation which was tainted with fraud.

[59] To support their views aforesaid, learned counsel relied on the recently decided High Court case of *Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors* [2013] 1 CLJ 153 (*Shayo*). The facts of the case in brief are these. The plaintiff in this case was a victim of a

computerisation exercise undertaken by the eighth defendant-12th defendant wherein under the said exercise the original manual title deeds were to be replaced with computerised ones. As a result of this faulty computerisation exercise the plaintiff's issue document of title was wrongly issued to the first defendant. By a power of attorney the first defendant sold the land to the second defendant who then sold the land to the third-fifth defendants. Some years later the third-fifth defendants sold the land to the sixth defendant who later sold it to the seventh defendant who stood as the registered proprietor. The plaintiff discovered something was amiss when the quit rent receipt was sent to them bearing someone else's name. The plaintiff instituted an action for the restoration of their title. The other defendants ie, D3-D7 claimed they were *bona fide* subsequent purchasers. Harminder Singh J held for the plaintiff even though some of the subsequent purchasers were in fact *bona fide* purchasers for value.

[60] We have deliberated on the relevance of the aforesaid authority and with respect we find that the case of *Shayo* is clearly distinguishable from the case at hand. In our considered view the issues in *Shayo* centered on the title which was issued *ultra vires* the NLC. The parties who had relied on this title and as a result transferred the same to the subsequent purchasers had in actual fact no title to give in the first place. As a consequence thereof, the learned trial judge in *Shayo* imputed liability on the eighth-12th defendants for the faulty registration of the plaintiff's title to the wrong entity which had caused the plaintiff to lose its proprietorship to the land. In the instant case, although a copy of the title was used to effect the transfer of the land as opposed to the original title, the hard facts of this case clearly reflects that the new title issued is indeed a title in continuation of the original title. Thus, we find that our present case is more akin to the case of *Adorna Properties*. The original title was indeed in the name of the plaintiff and the subsequent title in continuation was issued based on the fraudulent power of attorney executed by the forger. By reason of the crafty scheme enacted by the fraudsters claiming the original title was lost, the end result was that there were two titles to the same land.

[61] Thus, in our judgment guided by the pronouncement of the Federal Court in *Tan Ying Hong*, the fourth defendant being a subsequent purchaser obtains an indefeasible title if he can prove that he is a purchaser in good faith for valuable consideration. This

is a statutory protection accorded to a subsequent purchaser and in the present case the fourth defendant stands to benefit from it if he (fourth defendant) can prove that he is a *bona fide* purchaser for valuable consideration. At the risk of stating the obvious, the burden of proving that there was valuable consideration and good faith in the conveyance of the land lies on the fourth defendant.

[62] We may in this connection and by way of emphasis, reproduce below the following excerpt from the book entitled "*Sale and Purchase of Real Property in Malaysia*" by Dr Visu Sinnadurai. The eminent author on the same subject had this to say:

> In Malaysia it is submitted that under s. 340 of the National Land Code, deferred indefeasibility applies. *The registered proprietor who had acquired his title by registration of a void or voidable instrument does not acquire an indefeasible title under s. 340(2)(b). The indefeasibility is postponed until the time when a subsequent purchaser acquires the title in good faith and for valuable consideration. In other words, a registered proprietor, the vendor, under a sale and purchase agreement, even though he himself does not posses an indefeasible title, may give an indefeasible title to the bona fide purchaser.*
> (emphasis added)

[63] The question now is whether the fourth defendant has succeeded in proving that he is indeed a *bona fide* purchaser for valuable consideration who had obtained an indefeasible title. To this end, the fourth defendant had led evidence to show he had entered into a valid sale and purchase agreement with the third defendant and bought the land at the purchase price of RM1,150,000. Prior to the sale of the land the fourth defendant conducted a land search wherein the register reflected the third defendant as the registered owner. The fourth defendant had also led evidence to show that upon his instructions a valuation report was prepared by Messrs Khong & Jaafar on 17 July 2003 (exh. D65) and the market value of the land was assessed at RM1,200,000. The fourth defendant inspected the land prior to purchase and he had testified in court that the reason for the purchase of the land was for investment purpose.

[64] Having perused the contemporaneous documents which were tested against the testimony of the fourth defendant, we find no reason to disbelieve him. We find no evidence that the fourth defendant had acted in cohort with the third defendant in respect of the conveyance of the land. We also agree with the fourth

defendant's submission that there was no evidence before the court to suggest that the fourth defendant had any notice that the third defendant's title was defective nor was there any circumstances surrounding the sale and purchase agreement to suggest that the land might have been owned by someone else when the fourth defendant inspected the land in late 2002. To sum up, the direct evidence of the fourth defendant was neither inherently incredible nor inherently improbable. Indeed, it was corroborated by the evidence of surrounding circumstances.

[65] It is trite that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrust the primary task of evaluation of the evidence. But we are under a duty to interfere in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusions (per Gopal Sri Ram JCA (as he then was) in *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395).

[66] Hence, it is our finding that the fourth defendant is a *bona fide* purchaser for valuable consideration whose title is indefeasible by virtue of s. 340(3) of the NLC. Since it is our finding that the fourth defendant's title is indefeasible, the learned trial judge's order to have the fourth defendant to be equally liable in respect of the plaintiffs costs, cannot be sustained. The fourth defendant cannot be penalised for the wrongdoings of which he is not privy to.

[67] Accordingly, we are inclined to allow the fourth defendant's appeal and set aside the orders made by the learned trial judge.

Appeal No. B-01-140-03-2012 (Plaintiff's Appeal And Second Defendant's Cross Appeal)

[68] We will now move on to consider the issues ventilated in the plaintiff's appeal. In the same appeal the second defendant filed a cross appeal. We will address the second defendant's cross appeal in the later part of this judgment.

Plaintiff's Appeal Against The First Defendant

[69] Insofar as the plaintiff's appeal is concerned, since it is our finding that the fourth defendant's title and interest in the land is indefeasible, we would therefore allow the plaintiff's claim for

damages. However before we make such orders we must first ascertain the liability of all parties concerned. Before we embark upon the ascertainment of liabilities of each parties concerned, we shall first analyse the findings of the learned trial judge pertaining to the same.

[70] As for the first defendant the learned trial judge found that on balance of probabilities the first defendant could not have attested the purported power of attorney. This is based on the following:

(i) on the day the power attorney was attested ie, 29 March 2001, the first defendant was not in office but in the Sepang Land Office;

(ii) there was a glaring and blatant mistake in the spelling of "advocates and solicitors" in the first defendant's rubber stamp in Malay language which the trial judge opined is very unlikely that a Malay lawyer would actually make; and

(iii) since the police report, the statutory declaration and the signature of the Commissioner of Oaths was forged it is likely that the attestation to the power attorney could have also been forged. This clearly reflects the *modus operandi* of the forger.

Upon a careful examination of the evidence before the court and the findings of the trial judge on this issue, we are unable to find any material misdirection on the part of the learned trial judge as regards to either the issue before the court or the application of the law to the facts of this case.

[71] On the evidence before us we are satisfied that the learned trial judge had made the correct finding which is free from any appealable error. We are inclined to agree with the findings of the learned trial judge on the first defendant's liability. We find no reason to disturb the same. We also found strength to support our proposition through the evidence of DSP Amran (PW8) who had investigated this case. He testified in court that based on the report prepared by the Forensic Department it could not be established that it was indeed the signature of the first defendant in the purported power of attorney. Under these circumstances and for the reasons aforesaid we are convinced that on a balance

of probabilities the first defendant did not attest the said forged power of attorney and neither did she act in cohort with the forger and his accomplice (Wong) in perpetrating the fraud.

Second Defendant's Cross Appeal

[72] We now turn to the second defendant's cross appeal. As we have alluded to in the earlier part of this judgment the second defendant had filed a cross appeal ("second defendant cross appeal") against the decision of the learned trial judge, being dissatisfied with the findings of liability and the order of costs made against them. The learned trial judge found that that the second defendant firm of solicitors was liable in failing to inspect the authenticity of the documents or inform Messrs T Rajagopalu & Co of the two different versions pertaining to the whereabouts of the title and the inavailability of the quit rent receipt before discharging themselves from acting for the forger.

[73] We shall first address the second defendant's failure and by extension its solicitor ie, DW5 to inspect the authenticity of the documents and the duty of care owed by the second defendant if any. Before we embark further it is pertinent to note here that the learned trial judge did not specify the "documents" that the second defendant had failed to inspect. Hence we can only assume His Lordship was referring to the purported power of attorney wherein the authenticity was in question.

[74] Learned counsel for the second defendant had at the forefront of his arguments highlighted to us that DW5 had taken all the necessary steps to verify the *bona fides* of the power of attorney in question as what they usually adhere to in a normal conveyancing practice. This will include conducting a search at the High Court to ascertain the power of attorney had been duly registered, ascertaining the solicitor who attested the signature of the donor was indeed a solicitor actively in practice and finally conducting a search at the relevant land office to ensure that the power of attorney had been registered with the Land Office at which the land was registered.

[75] The issue now is whether DW5 in furtherance of her duties as a solicitor is duty bound to contact the donor of the power of attorney (the plaintiff) to verify whether she did actually execute the power of attorney and whether the donee named is

the lawful attorney, in light of the facts that there was nothing irregular nor had she any reason to believe the power of attorney in question was an instrument of fraud.

[76] In our judgment we are satisfied that based on the surrounding facts and circumstances there were nothing to suggest the purported power of attorney was irregular and it called for further investigation on the part of the solicitor (DW5). We are inclined to agree with the submissions of learned counsel for the second defendant that the learned trial judge had stretched the standard of care and the duty owed by the solicitor in this case a bit too far without any justification when His Lordship imputed a duty of care on the second defendant and by extension its solicitor, DW5. In discussing the duty of care owed by a solicitor to his client we can do no better than cite the case of *Neogh Soo Oh & Ors v. G Rethinasamy* [1983] 2 CLJ 218; [1983] CLJ (Rep) 663; [1984] 1 MLJ 126, wherein Gunn Chit Tuan J (as he then was) emphasised that:

> a solicitors duty is to use reasonable care and skill in giving such advice and taking such action as the facts of a particular case demand.

[77] Reverting back to the appeal before us, the issue now is whether DW5 had used reasonable care and skill in dealing with the power of attorney in question. In this regard, we refer to the case of *Lee Chee Kiang v. Johnson Tan Teck Seng & Anor* [2011] 9 CLJ 498; [2011] 8 MLJ 297, which was referred to by learned counsel for the second defendant where the issues were akin to the case at hand. In *Lee Chee Kiang v. Johnson Tan Teck Seng & Anor* (*supra*) the plaintiff's bone of contention was that a solicitor owes a duty of care in taking special caution where the intended transfer of land is to be executed by person or persons purporting to act as attorney of the registered landowners *vide* a power of attorney and also to ensure that the registered owners are in fact the parties who had executed the instrument granting power to sell the land. It was also argued on behalf of the plaintiff in that case that the solicitor ought to have carefully and properly verified with the registered owners personally to ensure the authenticity of the purported power of attorney and to confirm that the landowners had in fact executed the same.

[78] Having deliberated on the submissions advanced by the parties in that case David Wong Dak Wah J (now JCA) held that:

> It would be too onerous a duty to require a solicitor to investigate a power of attorney which on the face of it is proper. As stated earlier it would be impractical and slow down the process of doing business in the state … Accordingly it is my view that a properly executed power of attorney should be accepted unless cogent reasons show otherwise.

[79] We accept the views expressed by the learned judge in *Lee Chee Kiang v. Johnson Tan Teck Seng & Anor* (*supra*). We are inclined to adopt the same in similar vein. Accordingly we conclude that the second defendant, by its extension DW5 cannot be faulted for the irregularities which were not apparent on the face of power of attorney and/or any other documents as referred to by the learned trial judge. Henceforth, we accept the second defendant's contention that there was nothing irregular about the power of attorney which could have triggered any suspicion on DW5's part to investigate further.

[80] For the reasons aforesaid we find that the learned trial judge had misdirected himself in finding that the second defendant was negligent. We are convinced that based on the evidence led by DW5 all the necessary steps were taken to verify the *bona fides* of the purported power of attorney. This will include conducting a search at the High Court to ascertain the power of attorney had been duly registered, ascertaining the solicitor who attested the signature of the donor was indeed a solicitor actively in practice and finally conducting a search at the Land Office to ensure that the power of attorney had been registered with the Land Office at which the land was registered.

[81] Our next deliberation will be, what is the role played by the second defendant in the whole transaction involving the fraudulent transfer of the land from the plaintiff to the third defendant? To this end, DW5 testified during trial that she received two documents from the forger to vet ie, the power of attorney and the sale and purchase agreement as prepared by Messrs Rajagopalu & Co.

[82] At the High Court DW5 led evidence to show that upon going through the usual formalities as required in verification of the power of attorney and after making necessary amendments in the sale and purchase agreement, she had returned the same to

Messrs Rajagopalu. DW5 later assisted the forger in applying for a new title upon being informed by him that the original title was missing. DW5 testified that she had assisted the forger in applying for a new title after he had produced to DW5 the original police report allegedly lodged by the plaintiff with a statutory declaration affirmed by the plaintiff explaining about the missing title.

[83] Given these circumstances, DW5 had advised the forger to sign a supplementary agreement which was vehemently opposed by the forger. Being unable to convince her client (the forger) DW5 discharged herself on 16 May 2001. Pertinent to note here that at the time the transaction of the land was completed on 5 June 2001, DW5 was no longer the solicitor on record.

[84] We have perused the notes of evidence particularly to the testimony of DW5 where she explained clearly why she had discharged herself from acting for the forger. We reproduce the relevant portion of DW5's evidence which clearly speaks for itself:

Examination In-chief

Q : Why did you discharge yourself from acting?

A : Sometime in late April 2011, Ong came to see me and told me that the title had not in fact been surrendered to the land office, and it was informed to me by Mr. Wong earlier. According to Ong the Plaintiff was an old lady and she had actually misplaced the title and forgotten where she kept it. To support this statement Ong produced to me the original police report lodged by the Plaintiff together with the statutory declaration affirmed by the Plaintiff both of which stated that the Plaintiff had lost the Title.

Q : What Ong asked you to do next?

A : He asked me to assist in applying for a new title. I agreed to assist him to do this. ... However I strongly advised him to execute a supplementary agreement ... to reflect this new development, I knew from experience an application for a new title would take at least one year ... this delay would cause the breach of the sale and purchase agreement ... therefore my advice that supplementary agreement be signed.

Q : Did Ong hear your advice?

A : He refused my advice. He was adamant that he did not want the supplementary agreement. Under this circumstances, I told him I could not act for him longer as I could not

protect his interest, I told him to find another solicitor to represent him. I explained my concern that the delay would amount to a breach of the sale and purchase agreement and open up Ong to a suit by the 3rd Defendant.

Cross-Examination

Q : Now tell us exactly why you found that you should cease acting for Ong Choon Teng and on 16 May 2001 you sent the documents the original documents to Messrs T Rajagopalu?

A : He doesn't take my advice to enter a supplementary agreement and I wouldn't want to open anything up in the future that I be sued by my clients for not protecting his interest when there is nothing in writing.

Q : When you were told initially that the title was old and has been surrendered to the land office for replacement title and later you were told that was not true but the title has gone missing and the new title has to be applied for, what was your reaction?

A : They were telling me different things. I was actually quite angry. I say why they didn't tell from the very beginning, and he say it is not from him, I heard it from Mr. Wong.

Q : At that point in time when you heard this different story about the title having gone missing, were you suspicious of this transaction?

A : No.

[85] Now, in light of the above testimony by DW5 the learned trial judge made the following findings:

… Seterusnya SD5 ingin berjumpa Plaintiff untuk mengesahkan keesahan PA tersebut tetapi permintaan SD5 itu tidak dipenuhi oleh Ong Choon Teng dan SD5 menarik diri dari mewakili Ong Choon Teng …

Berdasarkan tingkah laku Ong Choon Teng dan apa yang telah berlaku itu SD5 menyedari bahawa ketiadaan surat hakmilik tanah tersebut telah diputar belitkan dan kelihatan mengesyaki sesuatu yang tidak kena berlaku berhubung dengan tanah tersebut. Resit cukai tanah pun tidak diberikan. Dalam berhadapan dengan situasi sebegini SD5 sepatutnya lebih berhati-hati dalam melaksanakan tanggungjawab dengan menyiasat kesahihan dokumen-dokumen

atau sekurang-kurangnya memaklumkan perkara ini kepada Tetuan T Rajagopalu apabila beliau menarik diri dari mewakili Ong Choon Teng.

[86] With utmost respect, we are unable to agree with the aforesaid findings. Based on the above testimony of DW5 we find that the learned trial judge had misdirected himself when he drew an inference and came to the wrong conclusion that DW5 had discharged herself because the forger refused to contact the donor of the power of attorney and DW5 was suspicious of the whole turn of events involving two versions to the title as stated by the forger. The error of the trial judge becomes more pronounced when construed against the background of the explanation accorded by DW5. It is crystal clear from the evidence of DW5 that her withdrawal was due to the fact that she could not get the much needed cooperation from the forger when he refused to execute the supplementary agreement to the existing sale and purchase agreement.

[87] Based on the evidence led by DW5 during the trial we are convinced that DW5 at the material time had no reason to be suspicious of any wrongdoings on the part of the forger given that he had substantiated his assertion as to the missing title by production of a police report, and a statutory declaration. DW5 genuinely believed that the title was missing. This explains why she had participated in the application of a new title.

[88] The learned trial judge also in his written grounds at para. 23 at p. 38 of the record of appeal had acknowledged the role of DW5 which is limited to the application for the new title. The learned trial judge had remarked the following in his grounds of judgment:

Adalah tidak dipertikaikan bahawa Ong Choon Teng dengan bantuan Puan Mok Shiau Ping (SD5) telah membuat permohonan untuk Surat Hakmilik baru tanah tersebut bagi menggantikan yang asal disebabkan Surat Hakmilik asal dikatakan hilang. Atas permohonan tersebut Defendan Kelima telah mengeluarkan Surat Hakmilik baru ...

[89] However, assuming there was suspicion on DW5's part, is she duty bound to inform Messrs Rajagopalu and can she be held negligent in her failure to do so? Our answer to this is thus: the second defendant's solicitor owes a duty of care to her client (the

forger) which she derived from the retainer. This duty certainly does not include informing a prospective solicitor who might take over any irregularities or discrepancies in the file. In highlighting a solicitor's duty under a retainer we can do no better than to cite the case of *Midland Bank Trust Co Ltd & Anor v. Hett, Stubbs & Kemp* [1978] 3 All ER 582 at p. 571, wherein it was held that:

> Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practicing a highly skilled profession, but I think that the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v. Beuselinck*, *Griffiths v. Evans* and *Hall v. Meyrick* demonstrate that the duty is directly related to the confines of the retainer.

[90] As can be gleaned from the above cited case and at the risk of repeating ourselves we must reiterate here that DW5's duty of care is confined to the forger alone and not the plaintiff. She had performed her duties as a solicitor in the preparation and execution of the legal documentations ie, the memorandum of transfer and the sale and purchase agreement in favour of her client and when she was unable to get her client's cooperation she decided to discharge herself.

[91] So far as the attestation of the memorandum of transfer was concerned, learned counsel for the plaintiff had highlighted that the MOT was not dated at the time DW5 attested her signature to it. DW5 explained that as a matter of general practice this is usually not done. She explained this in her cross-examination which is produced herein below:

> Q : See documents at page 2 … page 2 is your attestation. It says there disaksikan dengan tandatangan saya pada with the date signed by you. Are you telling the Court that you attested without putting a date?

A : Yes.

> We cannot date it because there are 3 months period from there. Where the conveyancing practice whereby it is been charge with the court and if it is been charged to the bank, you have to do all the redemptions and all thing and only then you date your MOT for adjudication.

[92] To corroborate the general practice as DW5 had explained above, a prominent member of the Bar who is also the Bar Council's Conveyancing Practice Committee Chair (Dato Low Beng Choo) (DW6) was called to testify and she had clearly explained that this is the general practice amongst the legal fraternity involved in conveyancing practice. However much to the second defendant's dismay it drew criticism from the plaintiff's counsel as saying something as the above as general practice would not necessarily mean it is a good practice. We have deliberated on this issue and in our considered view DW5's attestation on the undated MOT did not amount to negligence on DW5's part. In this regard we agree with and adopt as our own the observations made by Gunn Chit Tuan J (as he then was) in *Neogh Soo Oh & Ors v. G Rethinasamy* (*supra*). His Lordship in the said case held that:

> On questions involving negligence, reasonableness, and other qualities of conduct, when the criterion to be adopted is not clear, the acts or precautions proper to be taken under the circumstances, and even the general practice of the community, or in some cases of the particular individuals, are admissible as affording a measure by which the conduct in question may be gauged. Such evidence does not, of course, bind the jury as a fixed legal standard; it is merely one, amongst other circumstances, by which they may be guided. To do an act in a customary manner does not, then, necessarily render it justifiable, nor will abstention from a voluntary custom render a party for negligence.

[93] Similarly we would also rely on the English authority of *Simmons v. Pennington & Son (A Firm)* [1955] 1 All ER 240 CA, where both the High Court and the Court of Appeal concurrently held that "where the advice given by the solicitors was in accordance with the general conveyancing practice which had prevailed for a long time, the solicitors were not negligent, in particular where the consequences could not reasonably have been foreseen and were too remote. It is so easy to be wise after the event. One has to try to put oneself in the position of the

A solicitor at the time and see whether the solicitor had failed to come up to a reasonable standard of care and skill such as is rightfully required of an ordinary prudent solicitor. It is impossible to say that a solicitor is guilty of a breach of duty to his client when it was one of those misadventures and misfortunes which do
B sometimes happen even in the best-conducted businesses": per Denning LJ (later MR) at p. 243.

[94] Based on the authorities discussed in the preceding paragraphs and in light of the impression we have gained from the
C totality of evidence we failed to see how the second defendant can be faulted for the plaintiff's loss. In our considered view the second defendant was not negligent and neither did it in any way act in cohort with the forger to strip the plaintiff of her title. Accordingly, we allow the second defendant's cross appeal and set
D aside the orders of the learned trial judge made against the second defendant.

Trial Judge's Findings On The Third Defendant

[95] Insofar as the third defendant is concerned whilst we agree
E with the learned trial judge's findings that the third defendant was not a *bona fide* purchaser for value we do so for a different reason. In this regard the learned trial judge found that the third defendant was not a *bona fide* purchaser for value as it did not take physical possession of the land or attempted to recover the land even
F though it knew the land was cultivated by someone else with rubber plantation. It is our finding however that the third defendant is not a *bona fide* purchaser for value based on the fact that the whole transaction from the forger to the third defendant was tainted with fraud. The third defendant cannot have a good
G title which was obtained using voidable instruments. Being an immediate purchaser the third defendant's position is no different from that of the third respondent bank in *Tan Ying Hong*'s case.

[96] Insofar as evidence goes, the third defendant had called
H one witness to put forth their defence. This was DW8, K Durai a/l Kandasamy the managing director of the third defendant company. He gave evidence in court for the third defendant which can be briefly summarised as below:

I (i) He purchased the said land in 2001 for RM450,000 from the forger through his agent, one Mr Wong. The purchase price in the sale and purchase agreement was RM450,000 but he acknowledged that the actual price paid was RM850,000. The

balance RM400,000 was paid to Wong in cash. There are no receipts or acknowledgement of payment with him for any of the payments made. He couldn't recall if any letter was given from Ong to the third defendant appointing Wong as his agent. He couldn't recall also if the third defendant's solicitor was aware of the change in the purchase price from RM450,000 to RM800,000. He stated that the land was purchased to store materials used for his business and he was aware that the land was an agricultural land. However during cross-examination he stated that the land was bought to build a factory.

Q : Apakah factor yang membuat Datuk sebagai wakil Debarath metal untuk membeli hartanah yang menjadi subject matter tindakan ini iaitu hartanah ini lah, membuat keputusan membeli hartanah, Mengapa?

A : Untuk membina kilang baru.

Q : Kilang? Saya difahamkan oleh Datuk tadi perniagaan Debarath Metal adalah plastic recycling dan barang-barang besi lusuh. Kilang nak buat apa itu datuk?

A : Kita nak membina kilang memproses.

(ii) Part of the purchase price was paid to the forger (more than RM200,000) and part was paid to Wong (about RM100,000). DW8 was however unsure who had made payments of the said monies on the third defendant's behalf. The purchase price was paid in four instalments and all payments were made in cash within a three month period. Payments were made by someone from his office to the forger and he cannot recall who it was. He cannot recall receiving receipts for payments made or acknowledgement of payments made. He only had three 'bank-in' slips made to the forger.

(iii) DW8 confirmed that the payments were made after the date of transfer of the land to the third defendant ie, 5 June 2001 based on the bank-in slips provided in court. He had no explanation in cross-examination as to why payments for the said land were made after the land was transferred to the third defendant. The testimony given by DW8 speaks for itself:

Q : Boleh saya tanya Datuk mengapa penjual setuju untuk pindah milik ini sebelum dibayar dengan penuh?

A : Saya tidak ingat.

Q : Saya cadangkan Datuk, perlakuan ini adalah satu perlakuan yang sangat ganjil dan luar biasa. Setuju?

A : Setuju.

[97] We have gone through the notes of proceedings recorded by the trial judge, and the irresistible conclusion we arrive at will reflect that there were too much ill dealing in the conveyance of this land between the third defendant, the agent Wong and the forger. The dubious transaction was even acknowledged by DW8 himself in his evidence as reproduced below:

Q : Datuk, dalam keterangan datuk sebelum ini, mengikut kefahaman saya, lebih lima ratus ribu telah dibayar kepada Wong. Dua ratus lebih ribu dibayar kepada Ong Choon Teng

A : Ya.

Q : Wong adalah seorang ejen sahaja, Ong Choon Teng, penjual, betul?

A : Betul.

Q : Saya cadangkan Datuk bila seorang ejen menerima lebih dua kali ganda wang daripada penjual, ini lagi adalah satu perkara yang sangat ganjil, setuju?

A : Setuju.

[98] The third defendant had purchased the land to store materials, even though DW8 knew the land concerned was designated as an agricultural land. The purpose for which the land was purchased was also not clear as during cross-examination DW8 stated that the land was bought to build a factory. Part payments were made to Wong for which he does not have receipts or acknowledgement of payment with him. During cross-examination DW8 averred that he does not have details on the agent, Wong.

[99] The presentation of the legal documents and the representation of the forger and third defendant were handled by the same firm of solicitors' ie, Messrs Rajagopalu & Co. However, in respect of the preparation and attestation of the legal

documents ie, the SPA and the MOT *via* Form 14A, they were handled by two different firms ie, Messrs Isa Ling & Mok for the forger and Messrs Rajagopalu for the third defendant. During cross-examination, DW8 confirmed that he was not aware that Messrs Rajagopalu & Co was acting for both the third defendant and the forger. It is pertinent to note that Messrs Rajagopalu had again represented the third defendant when the third defendant sold the land to the fourth defendant.

[100] In the final analysis, after having the benefit of perusing the notes of evidence pertaining to the testimony of DW8 we are driven to the conclusion that DW8's evidence is nothing but self-serving in nature. Needless to say cogent evidence from DW8 as to details of the full payment of the purchase price of the land and pivotal aspects in the conveyance of the land was wanting. DW8's attempt to fortify and lend credence to his position by placing the burden on his solicitors fell through in light of the fact that they failed to call the solicitor who handled the matter for them to give evidence on their behalf. In this regard we agree with the submissions by learned counsel for the plaintiff that an adverse inference should be drawn against the third defendant in its failure to do so.

[101] We also make the following observations:

(i) The third defendant paid only RM450,000 for land valued by the Valuation Department at RM1.150 million. In fact the actual purchase price of the land was RM850,000 and not RM450,000 as stated in the sale and purchase agreement. The third defendant or their solicitors should have been put on notice to investigate into the purchase price.

(ii) There was undue haste in completing the registration of the land transaction and the registration of title. It took five weeks from the date of the sale and purchase agreement to the transfer of the said land to the third defendant. Clearly from the evidence of DW8 there was no resolution passed for the purchase of the land. This invokes the question of whether the purchase of the land was for the benefit of the company or for the personal benefit of the directors of the company.

(iii) As a prudent buyer the third defendant by extension their managing director did not exercise due diligence and were not prudent in the conveyance of the land. This can be seen through the evidence of DW8:

> Q : Pada bila-bila masa bila transaksi ini dijalankan, adakah geran tanah bagi tanah ini diberikan kepada Datuk atau Debarath atau kepada peguam Datuk, T. Rajagopalu bila transaksi ini dilakukan? Bila perjanjian jual beli dibuat dan bila pindah milik telah pun ditandatangani?
>
> A : Saya tidak ingat.
>
> Q : Ini bermakna datuk telah membeli tanah ini tanpa mengambil kira samada geran tanah ada atau tidak?
>
> A : Memang ada geran tapi ...
>
> Q : Tidak lihat langsung?
>
> A : Saya berurusan bersama saya punya peguam saja.
>
> Q : Urusan dengan peguam tapi kita tidak tahu samada dokumen itu timbul ...
>
> A : Itu urusan peguam saya saja. Penjual dengan peguam saya saja.
>
> Q : Adakah syarikat datuk atau Datuk pernah mengambil geran tanah ini daripada peguam datuk?
>
> A : Tak ada.

[102] Premised on the above, we are convinced that the third defendant had concluded the sale without any proper investigation into the title or the persons who are the actual proprietors. The third defendant took advantage of the low purchase price and he acknowledged that this was done to evade tax. We failed to see why an enormous sum of money was then paid to Wong. The third defendant offered no explanation. The third defendant in the conveyance of the land was under obligation to investigate properly all matters relating to the sale of the land. Clearly based on the facts and circumstances of this case the third defendant was negligent in not doing so. In our considered view a negligent purchaser cannot be accorded the protection of this court because a purchaser in good faith does not include a purchaser who has

been negligent or who had kept his eyes shut (*Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 (*Au Meng Nam*). This court in *Au Meng Nam* had held that the purchaser is under the obligation to investigate properly all matters relating to the sale and not just blindly accept what was claimed by the vendor as correct and genuine. The purchaser in that case clearly disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. Hence, when a purchaser failed to take ordinary precautions which ought to have been taken in such a matter, he is not entitled to the protection of the court.

[103] The case of *Au Meng Nam* reiterated the governing principles as propounded by Linley MR in *Oliver v. Hinton* [1899] 2 Ch 264. The Chancery Court in *Oliver v. Hinton* found the purchaser to be grossly negligent in failing to make inquires as to the title and relied on his agent completely. The Chancery Court through Linley MR held that:

> In the present case there has been no fraud on the part of the Defendant; there has only been gross negligence in the ordinary sense of words.
>
> … negligence so gross as would justify the Court of Chancery in concluding that there had been fraud in an artificial sense of the word-such gross negligence, for instance as omitting to make any inquiry as to the title of the property. In that sense of the word, I think, there has been in the present case on the part of the Defendant negligence so gross as would have led the Court of Chancery to impute fraud of that kind to her. I do not mean to suggest that there was any fraud in fact.

[104] To recapitulate, for the reasons aforesaid and as rightly found by the learned trial judge the third defendant is not a *bona fide* purchaser for valuable consideration. In the final analysis, it is our considered view that the third defendant's gross negligence had facilitated the forger's elaborate and crafty plan to strip the plaintiff of her title and ownership to the land.

Plaintiff's Appeal On Damages

[105] The learned judge did not award any damages to the plaintiff as he found that, apart from the loss of title to the land arising from the fraudulent transfer of the land to the third and

fourth defendants, the plaintiff did not suffer any loss in relation to her enjoyment of the land. Based on the undisputed evidence, the plaintiff was:

(a) at all times in possession of the land; and

(b) had cultivated and enjoyed the benefits of the land without any disturbance from both the third or fourth defendant.

[106] As for the loss of title to the land, as the judge had found both the third and fourth defendants liable he had ordered that title be restored to the plaintiff and hence no damages was ordered for the loss of title.

[107] We agree with the learned judge's findings that the plaintiff did not suffer any loss of the enjoyment of the land.

[108] However in the present appeal as it is our finding that the fourth defendant has acquired an indefeasible title to the land, we had set aside the orders of the learned judge. The plaintiff should, in the circumstances, be entitled to damages for loss of ownership of the land, which in our view would be the market value of the land as at the date of this judgment.

Plaintiff's Appeal On Costs

[109] As regard to costs, we are of the view that the plaintiff, first, second, and fourth defendant's costs here and below should be borne by the third and fifth defendants jointly and severally.

[110] In conclusion and for the reasons adumbrated above, we make the following orders in the respective appeals:

Appeal No. B-01-141-03-2012

The findings of the learned trial judge that the fourth defendant is not a *bona fide* purchaser and his interest to the title is defeasible are hereby set aside. Order of costs made against the fourth defendant is also set aside. There shall be no order for rectification of the title or for the endorsement in the transfer *vide* Geran 44293 be cancelled and the issue document of title be rectified by the fifth defendant. The fourth defendant's name is to remain in the register as the registered proprietor of the land.

Appeal No B-01-140-03-2012

(i) The finding of no order as to liability by the trial judge in favour of the first defendant is affirmed;

(ii) The finding of liability by the trial judge against the second defendant is set aside; and

(iii) The learned trial judge's orders in allowing plaintiff's claim *vide* Civil Suit No: 21-41-04 is hereby set aside and substituted with the following:

(a) There shall be no order for rectification of the title or for the endorsement in the transfer *vide* Geran 44293 be cancelled and the issue document of title be rectified by the fifth defendant. The fourth defendant's name is to remain in the register as the registered proprietor of the land. The plaintiff is awarded damages for loss of ownership of the land, which would be the market value of the land as at the date of this judgment, the amount to be paid jointly and severally by the third and fifth defendants. For this purpose, we order that the matter be referred to the Registrar of the High Court for the latter to assess and determine the market value of the land; and

(b) The third and fifth defendants to bear the plaintiff's, the first, second and fourth defendant's costs here and below jointly and severally.